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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91217589
Party	Defendant J & N Sales, LLC
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Submission	Motion to Compel Discovery
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UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD

_____)	
RHYTHM HOLDING LIMITED,	)	Opposition No. 91-217589
)	
Opposer,)	
	)	In the Matter of:
v.)	
	)	Application No. 86/050,581
J & N SALES, LLC,)	
	)	Mark: RHYTHM IN BLUES
Applicant.)	
_____	)	Attorney Ref. 256.612

APPLICANT'S MOTION TO COMPEL

Applicant J & N Sales, LLC moves the Board for entry of an order, pursuant to 37 CFR 1.120(e), compelling opposer (A) to complete its answers to applicant's interrogatories no. 1, 2 and 4 by identifying and producing documents¹ concerning its due diligence and other deliberation, consideration and investigation in acquiring its marks and registrations asserted in this proceeding, as well as related documents of its predecessors in its possession, custody or control; (B) to answer applicant's interrogatory no. 7, identifying and producing documents concerning the identification of its target markets by demographic and other criteria; and (C) to complete its production in response to applicant's document requests no. 1 (seeking production of documents identified in response to applicant's interrogatories no. 12, 14, 15 and 19 insofar as they seek documents concerning opposer's objections to third party use of marks comprising RHYTHM or similar objections directed to opposer) and document requests no. 3, 11 and 14 concerning the same.

¹ Applicant's document request no. 1 seeks the production of documents identified in response to applicant's interrogatories. Applicant seeks the identification of all documents sought in discovery so that those withheld on the basis of privilege or exemption are properly identified to facilitate a challenge to the claim. The identification of documents that are produced may be accomplished pursuant to FED.R.CIV.P. 33(d) by producing and relating them to the interrogatory to which they respond.

This motion is based upon this memorandum, the declaration of James A. Power Jr, its exhibits, as well as the papers filed in support of applicant's previous motion to compel, request for reconsideration of its denial without prejudice, petition to the director, and the decisions addressing each. This motion limits the matters addressed in applicant's previous motion based upon the intervening communications between counsel, including the papers exchanged on the motions, communications between counsel, and revised interrogatory responses served by opposer in response to observations made and comments expressed by the Board.

Applicant initially moved this Board for an order compelling opposer to answer applicant's interrogatories, all 26 to which opposer objected, and to produce documents responsive to applicant's requests (Papers No. 8-11 and including opposer's surreply, Paper No. 13). The Board, having determined that applicant did not sufficiently pursue opposer's final refusal to supplement its responses, denied applicant's motion regarding its document requests without prejudice to renew after further efforts and progress have been made to resolve the issues raised therein. The Board also denied applicant's motion to compel interrogatory answers as moot on the ground that, after opposer raised new objections ("moved the goal posts") in response to applicant's motion, applicant addressed those new objections in its reply brief and, though the Board adopted opposer's surreply position that applicant did not try to resolve those new objections with counsel before filing its motion, ruled that opposer would be unfairly deprived of an opportunity to address applicant's arguments because the rules would preclude opposer from submitting a surreply (Paper No. 14, August 29, 2015).²

Applicant's request for reconsideration (Papers No. 15, 21, 22) was denied on December 4, 2015 (Paper No. 25), as was applicant's petition to the director, on December 30, 2015 (Paper No. 26). This proceeding was removed from suspension January 4, 2016 and dates were reset, discovery to end January 8, 2015 (Paper No. 27).

² Since raising those new objections, opposer has neglected to amend its "no response required" to applicant's document request no. 1 that had been based on its numeric objection.

During the course of these motions, the parties exchanged further correspondence in an effort to resolve the outstanding issues (Exhibits to Papers No. 21 and 22). The exchange of briefs on the initial motion (which were not then considered in connection with Rule 2.120(e)(1) because they were exchanged after the motion was filed), the briefs exchanged on the request for reconsideration and petition to director, as well as the helpful comments provided by the Board in its orders on these motions, opposer having twice revised its interrogatory answers, signed and sworn by the party (Paper No. 24; Power Decl ¶ 4, Exhibit I),³ resulted in significant progress. On January 7, 2016, after completing a review of over 4,000 documents produced by opposer and relating them to the second revised interrogatory responses mailed December 11, 2015, applicant's counsel outlined the remaining issues in a letter to opposer's counsel (Power Decl. ¶ 5, Exhibit J). In the five business days provided between the lifting of suspension and the reset end of discovery, applicant prepared this motion with some confidence that the issues raised in its counsel's January 7 letter can be resolved without further intervention of the Board.

A. Applicant Is Entitled to Full Disclosure of Information and Documents Concerning Opposer's Consideration and Adoption of Its RHYTHM Marks, Including Its Due Diligence in Acquiring Those Marks, as Well as Information in the Possession, Custody or Control of Opposer or Its Related Predecessors in Interest Concerning Their Adoption of the Mark Asserted in this Opposition

Since applicant filed its initial motion, opposer has maintained its position that it is not required to disclose information in response to applicant's interrogatories no. 1, 2 and 4 on the grounds that it "has no knowledge" of the acts of its predecessors in interest related by common ownership and, apparently, in acquiring the mark, that it did not "consider, deliberate, select or adopt" the mark, the strength of it or its registration. Opposer raises no legal argument in support of its evasion of these interrogatories, just an inartful attempt to circumvent them.

³ Exhibits A - H were submitted with the declaration supporting applicant's initial motion.

Opposer's Registration No. 3,610,417 for RHYTHM was issued to Grey/Murray, a Hong Kong partnership related to Opposer by common ownership, which assigned it to opposer on August 31, 2009. Opposer's Registration No. 3,884,199 was issued directly to opposer, a Samoan entity also based in Hong Kong, on its application. Opposer's Registration No. 3,890,579 for RHYTHM LIVIN' was issued to RGI Ltd., another Hong Kong entity related to opposer by common ownership, and assigned to opposer, also on August 31, 2009. In each case, opposer's predecessor was represented by the same attorney that commenced this opposition proceeding, William E. Maguire.

Information concerning a party's selection and adoption of its involved mark is generally discoverable, TBMP 414(4), and a party is responsible for all documents in its possession, custody or control. Fed.R.Civ.P. 34(a)(1).

B. Applicant's Clarifications of Its Interrogatory No. 7 Are Sufficient to Render It Comprehensible to Opposer's Counsel

Opposer has maintained an objection to applicant's interrogatory no. 7, on the purported ground that it is "incomprehensible" (Exhibits to Papers No. 11 and 24; Power Decl. ¶ 4, Exhibit I). Applicant has clarified, offered reasonable construction, and sought clarification of opposer's objection based on its counsel's purported difficulty, most recently in applicant's letter to opposer's counsel (Power Decl. ¶ 5, Exhibit J), all to no avail. The classes of customers for a party's involved goods or services are discoverable. TBMP 414(3). Pending a response to that most recent letter, applicant expects that opposer will find a way to properly answer that interrogatory short of further involvement of the Board.

C. Applicant Is Entitled to Production of Documents Concerning Opposer's Objections to Third Party Use of Marks Comprising RHYTHM

Upon completing its review of documents produced by opposer in this proceeding, applicant observed that opposer, in response to applicant's document requests no. 1 (seeking production of documents identified in response to applicant's interrogatories no. 12, 14, 15 and

19) and document requests no. 3, 11 and 14, omitted from its production communications between opposer and third parties concerning objections to use or registration of marks comprising RHYTHM, including objections, cease and desist letters, lawsuits, trademark opposition or cancellation proceedings threatened or commenced, settlement negotiations and agreements, co-existence agreements, and related correspondence. Applicant's interrogatory no. 12, for example, seeks the identity of each document concerning:

. . . the events and circumstances under which Opposer has objected or considered objecting to the use or registration by another of a mark comprising the word "rhythm." . . . The documents to be identified in response to this interrogatory include but are not limited to correspondence between Opposer or its counsel and the person or entity to whom the objection was directed or its counsel, internal e-mails, documents or notes of Opposer, pleadings, papers, discovery requests and responses in any legal proceeding and any correspondence therein, and any public or private comment. [Paper No. 8, Exhibit A to Power declaration therein]

Applicant seeks production of those documents by its request no. 1 (*id.*, Exhibit G). Applicant's document request no. 3 seeks "all documents concerning any use of a mark comprising 'rhythm' by a third party in connection with the advertising or sale of wearing apparel," request no. 11 seeks "all documents concerning communications from Opposer objecting to use by another of a word, phrase, symbol, trademark or trade designation comprising the word 'rhythm'," and request no. 14 seeks "all documents concerning Opposer's awareness of any use by another of a word, phrase, symbol, trademark or trade designation comprising the word 'rhythm'." *Id.*

These matters are highly relevant to opposer's assessment of the field of similar marks, under what circumstances it may deem marks comprising RHYTHM not to be likely confused with opposer's marks, and may constitute admissions on the part of opposer even though they may not completely resolve the precise matter at issue in this proceeding.⁴ Accordingly,

⁴ Information concerning litigation and controversies including settlement and other contractual agreements between a responding party and third parties based on the responding party's involved mark is discoverable. TBMP 414(10); *Johnston Pump/General Valve Inc. v. Chromalloy American Corp.*, 10 USPQ2d 1671, 1675 (TTAB 1988) (licensing agreements and

opposer's offer to produce only representative samples of documents responsive to requests no. 3 and 11 and to the breadth of request no. 14 (*id.*, Exhibit H) are unavailing, since what is sought are individual admissions or statements that will vary from one case and one document to another and cannot be represented by mere samples selectively produced by opposer.

While opposer has now referred to its production documents numbered 2446-2891 in response to this discovery (Power Decl. ¶ 4, Exhibit I; Exhibit to Paper No. 21), nowhere in that production nor anywhere else can be found opposer's complete set of communications concerning its objections to third parties' or its own RHYTHM marks. The production is comprised merely of protest letters to the Trademark Office, responses thereto, a few cease and desist letters without any following communication, and selected trademark watch results. Power Decl. ¶ 3. The board aptly recognized opposer's obligations in this respect in its order on reconsideration of applicant's motion:

Board records indicate that Opposer has commenced fifteen oppositions and cancellations against different parties who seek to register or have registered marks containing variations on the word RHYTHM.
<http://ttabvueint.uspto.gov/ttabvue/v?pnam=Rhythm%20Holding%20Limited%20%20>
As such, Opposer should have information necessary to respond to interrogatories regarding its pleaded RHYTHM mark already prepared.

Paper No. 25 at p. 7, n. 9.

arrangements between opposer and third parties and amount of sales thereto are relevant); *American Society of Oral Surgeons v. American College of Oral & Maxillofacial Surgeons*, 201 USPQ 531, 533 (TTAB 1979) (relevant to show admissions against interest, limitations on rights in mark, course of conduct leading to abandonment, that the mark has been carefully policed, etc.); *Georgia-Pacific Corp. v. Great Plains Bag Co.*, 190 USPQ 193, 197 (TTAB 1976) (settlement agreements that have avoided litigation may show limitations on party's rights in mark or reveal inconsistent statements); *J.B. Williams Co. v. Pepsodent G.m.b.H.*, 188 USPQ 577, 580-81 (TTAB 1975) (identity of all civil and USPTO proceedings involving mark is not objectionable); *Johnson & Johnson v. Rexall Drug Co.*, 186 USPQ 167, 172 (TTAB 1975) (contacts with third parties, such as through litigation or agreements, based on pleaded mark for involved goods, are relevant). Moreover, Information concerning a party's awareness of third-party use and/or registration of the same or similar marks for the same or closely related goods or services as an involved mark, is discoverable. TBMP 414(9).

Conclusion

For the foregoing reasons, it is respectfully submitted that opposer be compelled to answer applicant's interrogatories and produce the documents sought by this motion, that the discovery period and all remaining scheduling dates be extended until 30 days from the Board's decision on this motion, and that opposer be precluded from relying upon any document or thing not produced in response to applicant's requests.

Respectfully submitted,

New York, New York
January 8, 2016

/jpower/
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Attorneys for Applicant

Certificate of Service

I hereby certify that, on January 8, 2016, copies of the foregoing Motion to Compel and Declaration in support with Exhibits I and J were served upon opposer's counsel of record by first class mail, postage prepaid, in an envelope addressed to:

John L. Welch, Esq.
Wolf Greenfield & Sacks. P.C.
600 Atlantic Ave.
Boston, MA 02210-2211

/jpower/
James A. Power Jr

UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD

RHYTHM HOLDING LIMITED,)	
	)	Opposition No. 91-217589
)	
Opposer,)	
	)	In the Matter of:
v.)	
	)	Application No. 86/050,581
J & N SALES, LLC,)	
	)	Mark: RHYTHM IN BLUES
Applicant.)	

DECLARATION

JAMES A. POWER JR declares under penalty of perjury that the following statements are true and correct to the best of his knowledge and belief.

1. I am counsel for applicant J & N Sales LLC in this opposition proceeding and submit this declaration in support of its second motion to compel the production of documents and interrogatory answers from Opposer.

2. Applicant's discovery requests, opposer's responses, communications between counsel prior to those submitted as exhibits to this declaration, revised responses, and other papers upon which this motion is based are in the Board's record and specifically referenced in applicant's memorandum in support of its motion.

3. While opposer has now referred to its production documents numbered 2446-2891 in response to this discovery (Exhibit I; Exhibit to Paper No. 21), nowhere in that production nor anywhere else can be found opposer's complete set of communications concerning its objections to third parties' or its own RHYTHM marks. The production is comprised merely of protest letters to the Trademark Office, responses thereto, a few cease and desist letters without any following communication, and selected trademark watch results.

4. On December 11, 2015, opposer mailed a second revised set of responses to applicant's interrogatories, submitted with this declaration as Exhibit I.

5. On January 7, 2016, opposer e-mailed its latest attempt to resolve the discovery issues that remain outstanding in the letter submitted with this declaration as Exhibit J.

The undersigned being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. 1001, and that such willful false statements and the like may jeopardize the validity of the application or document or any registration resulting therefrom, declares that all statements made of his/her own knowledge are true; and all statements made on information and belief are believed to be true.

January 8, 2016

/jpower/
James A. Power Jr

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

RHYTHM HOLDING LIMITED,)	
)	
Opposer,)	
)	
v.	)	Opposition No.
	)	91217589
J & N SALES, LLC,)	
)	
Applicant.)	

**OPPOSER'S RE-REVISED RESPONSES TO APPLICANT'S
INTERROGATORIES**

Opposer RHYTHM HOLDING LIMITED responds as follows to Applicant's Interrogatories. Opposer maintains its objection that the number of Applicant's interrogatories, including subparts, exceeds the limit of seventy-five set by Rule 2.120(d) of the Trademark Rules of Practice.

GENERAL OBJECTIONS

A. Opposer objects to these Interrogatories to the extent they seek information not relevant to the claims and issues raised in this opposition proceeding and not reasonably calculated to lead to the discovery of admissible evidence. Specifically, and without limitation of the foregoing objection, Opposer objects to the revelation of information relating to jurisdictions other than the United States.

B. Opposer objects to the Interrogatories to the extent they seek to impose burdens or obligations upon Opposer that are broader than, inconsistent with, or not authorized under the Federal Rules of Civil Procedure, the Trademark

Rules of Practice, or any other applicable rules or laws.

C. Opposer objects to these Interrogatories to the extent that they are vague and ambiguous, overly broad, unduly burdensome, lacking in particularity, duplicative, cumulative, redundant, incomprehensible, and/or unreasonable, as well as to the extent that they are unduly burdensome because they impose a significant and unjustifiable expense and inconvenience on Opposer.

D. Opposer objects to the Interrogatories to the extent that they purport to require unreasonably costly and/or time-consuming measures to locate and produce responsive information. Opposer objects to any interpretation of the Interrogatories that would require Opposer to produce any information that cannot be located by means of a reasonably diligent, good faith review of its files.

E. Opposer objects to the Interrogatories to the extent they seek privileged information not subject to discovery, including information that constitutes or relates to attorney- client communications, attorney work product, or materials subject to the common interest privilege or joint defense privilege. In responding to the Interrogatories, Opposer will not undertake to provide information that is privileged or otherwise protected from discovery by law.

F. Opposer objects to the Interrogatories to the extent that they seek information that is not in Opposer's possession, custody or control or is equally available to and/or in the possession, custody or control of Applicant.

G. Opposer objects to the Interrogatories to the extent the information sought thereby is publicly available or obtainable by Applicant from other sources that can provide the requested information more conveniently, more easily

and/or less expensively than can Opposer.

H. Opposer objects to the Interrogatories to the extent that they are phrased in absolute terms, to the extent that such interrogatories are overly broad and burdensome. If a request asks for *all* facts on a particular subject, Opposer, in responding to such request, will undertake to supply such information as may be reasonably accumulated at the time of the response.

I. Opposer objects to the Interrogatories to the extent that they purport to impose an obligation to preserve and/or produce any information that was newly created or received after the receipt of the Interrogatories, because efforts to preserve and/or produce such documents or information would be unduly burdensome and require unreasonable expense.

J. Opposer objects to the Interrogatories to the extent that they contain inaccurate, incomplete or misleading descriptions of the facts, persons, relationships, and/or events underlying this proceeding Action. Opposer further object to the Interrogatories to the extent that they assume the existence of facts that did or do not exist or the occurrence of events that did not take place. Opposer further objects to the Interrogatories to the extent that they state, imply or assume any legal conclusion. Any response or provision of information in response to the Interrogatories is not intended to provide, and shall not constitute or be construed as providing, an admission that any factual or legal predicates stated in the Interrogatories are accurate.

K. Opposer objects to the Interrogatories to the extent they are duplicative (in whole or in part) of other Interrogatories and/or seek the same information.

RESERVATION OF RIGHTS

Opposer provides its Responses without waiver of, and subject to:

1. The reservation of all questions and/or objections as to competency, relevancy, materiality, privilege and admissibility of the responses hereto and the subject matter thereof as evidence for any purpose in any further proceedings herein (including the trial period in this proceeding) and in any other action or proceeding;
2. The right to object to the use of any such response, or the subject matter thereof, on any grounds in any further proceedings herein (including the trial period in this proceeding) and in any other action or proceeding;
3. The right to object on any ground at any time to a demand or request for further response to these or any other discovery request involving or relating to the subject matter of the items herein responded to;
4. The right at any time to revise, correct, add to, supplement or clarify any of the responses contained herein; and
5. Any applicable privilege, immunity, or protection, including but not limited to the attorney/client privilege and the work product exemption.

Each of the above General Objections and Reservation of Rights is by this reference incorporated fully in each individual response below, and each individual response is made subject to and without waiver of such General

Objections and Reservation of Rights.

RESPONSES

INTERROGATORY NO. 1:

Identify each person who participated in the consideration, deliberation, selection, adoption and/or approval by Opposer a word or phrase comprising the word “rhythm” as a trademark for the marketing and sale of wearing apparel, and identify each document concerning such participation and the nature and extent thereof.

RESPONSE NO. 1:

Opposer objects to this interrogatory on the ground that it seeks information that is neither relevant to the issues of this proceeding, nor likely to lead to the discovery of admissible evidence.

Further responding, Opposer states the following:

The application underlying Registration No. 2094048 (not pleaded) for the mark RHYTHM was filed in 1995 by a company called Planet Earth Skateboards, Inc., claiming a first use date in 1994. The registration was subsequently assigned three times, in 2004, 2007, and in 2009. The second assignment identifies Jeff Larsen as Vice-President of Earth Products, Inc. The third assignment identifies Alan Charles Murray and Peter Scott Grey of Grey/Murray Partnership, and Hung Ho Wong (aka Maurice Wong) as Director of Rhythm Holding Limited. These assignment documents are publicly available in the USPTO assignment records. Opposer does not know who participated in the “consideration, deliberation, selection, adoption and/or approval” of the mark in or about 1994, and has no related documents.

Registration No. 3610417 for the mark RHYTHM issued from an application filed in 2006 by Earth Products, Inc. It has been twice assigned. The first assignment identifies Jeff Larsen as Vice-President of Earth Products, Inc. The second assignment identifies Peter Scott Grey and Jamahl S. Grey of Grey/Murray Partnership, and Hung Ho Wong as Director of Rhythm Holding Limited. These assignment documents are publicly available in the USPTO assignment records. Opposer does not know who participated in the “consideration, deliberation, selection, adoption and/or approval” of the mark in or about 2006, and has no related documents.

Registration No. 3884199 for the mark RHYTHM issued from an application filed in 2009 by Opposer, at the direction of Maurice Wong. Opposer has no documents related to the “consideration, deliberation, selection, adoption and/or approval” of the mark at this time.

Registration No. 3890579 for the mark RHYTHM LIVIN issued from an application filed in 2006 by R.G.I. Limited, and was assigned to Opposer in 2009. The assignment document identifies two individuals: Alan Charles Murray as Director of the assignor, and Hung Ho Wong as Director of the assignee. The assignment document is publicly available in the USPTO assignment records. Opposer does not know who participated in the “consideration, deliberation, selection, adoption and/or approval” of the mark, and has no related documents.

INTERROGATORY NO. 2:

Identify each document concerning consideration by Opposer of the use or

registration of any phrase comprising the word “rhythm” as a trademark for wearing apparel.

RESPONSE NO. 2:

Opposer purchased the mark RHYTHM from a predecessor-in-interest, as is reflected in the assignment records of the USPTO in connection with Registration No. 3,610,417. Consequently, the Opposer does not have the information sought by this interrogatory. In any event, Opposer objects to this interrogatory on the ground that it seeks information that is neither relevant to the issues of this proceeding, nor likely to lead to the discovery of admissible evidence.

Nonetheless, Opposer states the following: Opposer has no documents relating to consideration of any phrase comprising the word “rhythm.”

INTERROGATORY NO. 3:

Identify each person who participated in the design, selection, placement, and/or content of advertisements, labels, packaging, social media or other uses by Opposer of a trademark comprised of the word “rhythm” in connection with the marketing, advertising, promotion or sale of wearing apparel, and identify each document concerning each subject.

RESPONSE NO. 3:

Opposer objects to this interrogatory on the ground that it seeks information that is neither relevant to the issues of this proceeding, nor likely to lead to the discovery of admissible evidence. Opposer further object to the identification of “all” documents on the ground that such request is overly-broad and burdensome. Further responding, and

without waiver of said objections, Opposer responds as follows: Josh Barrett and Eileen Hoffman.

INTERROGATORY NO. 4:

Identify each person who participated in, reviewed, directed, solicited or was aware of any search or opinion concerning Opposer's use or registration of a trademark comprising the word "rhythm" in connection with the marketing and sale of wearing apparel, and identify each document concerning such search or opinion.

RESPONSE NO. 4:

Opposer acquired the mark RHYTHM by assignment, and it has no knowledge regarding any searches performed by or opinions held by its predecessors-in-interest. Daniel Wordsworth may have been involved on behalf of the predecessors-in-interest. Subsequently, Maurice Wong and Eileen Hoffman were involved on behalf of Opposer. Also, see Interrogatory Response No. 1, above. Further responding, Opposer states that it has no such documents at this time.

INTERROGATORY NO. 5:

Identify and describe each garment or item of wearing apparel in connection with which Opposer has used a trademark comprising the word "rhythm" and, for each garment or item for each trademark, state the dates during which each garment or item was sold.

RESPONSE NO. 5:

Opposer objects to this interrogatory on the ground that it is overly-broad and burdensome in seeking the identification each of the many items of apparel sold by Opposer under the pleaded marks. Moreover, Opposer objects to this interrogatory on the ground that it seeks information that is not relevant to the subject matter of this proceeding, and not likely to lead to the discovery of admissible evidence. Further responding, and without waiver of said objections, Opposer states: Opposer's many products are depicted in the catalogs provided to Applicant as Opposer's production nos. 1-532, 557-1257, and 3057-4131. In addition, identifications and pictures of many products may be found in Opposer's production documents nos. 535-550 and 3046-3056.

INTERROGATORY NO. 6:

Identify each store, web site, vendor or other retail establishment at or on which garments or items of wearing apparel originating with Opposer have been sold or offered for sale in connection with a trademark comprising the word "rhythm."

RESPONSE NO. 6:

Opposer objects to this interrogatory on the ground that it is overly-broad and burdensome in seeking the identification of every customer of Opposer. Further responding, and without waiver of any of its objections, Opposer states: see Opposer's production documents nos. 1290-1336 and 1339-2240.

INTERROGATORY NO. 7:

Identify each document concerning, by demographics, behavior, lifestyle,

interests, price point, income, geographic location, or other characteristic or category deemed by Opposer to affect purchasing behavior of consumers that purchase or that Opposer has intended or expected to purchase garments or items of wearing apparel originating with Opposer and sold in connection with a trademark comprising the word "rhythm."

RESPONSE NO. 7:

Opposer objects to this interrogatory on the ground that it is incomprehensible.

INTERROGATORY NO. 8:

State the value and volume of Opposer's annual sales of each garment or item of wearing apparel sold by Opposer in connection with a trademark comprising the word "rhythm," the identity of each customer to whom each value and volume of sale was made, and identify each document concerning such trade channels.

RESPONSE NO. 8:

Opposer objects to this interrogatory on the ground that it is overly-broad and burdensome and not reasonably calculated to lead to the discovery of admissible evidence. Further responding, and without waiver of that objection, see Opposer's production documents nos. 1290-1445, 2892-3045, 3807-3809, 3817-3822, and 3836-3889.

INTERROGATORY NO. 9:

State the suggested and actual retail price of each garment or item of wearing

apparel sold or marketed by Opposer since January 1, 2014 in connection with a trademark comprising the word “rhythm,” and identify each document concerning such prices.

RESPONSE NO. 9:

Opposer objects to this interrogatory on the ground that it is overly-broad and burdensome and not reasonably calculated to lead to the discovery of admissible evidence. Further responding, and without waiver of that objection, see Opposer’s production documents nos. 551-556, 739-776, 1319-1338, 3063-3075, and 3239-3276.

INTERROGATORY NO. 10:

Identify the persons most knowledgeable regarding Opposer’s first and subsequent awareness of Applicant’s trademark RHYTHM IN BLUES or application to register that mark and identify each document concerning such awareness.

RESPONSE NO. 10:

Opposer objects to this interrogatory on the ground that it seeks information that is not relevant to the subject matter of this proceeding and is not likely to lead to the discovery of admissible evidence. Nonetheless, Opposer states the following: The person “most knowledgeable” as to Opposer’s first and subsequent awareness is William Maguire. He became aware of the opposed application and the mark when he received the Trademark Watch Notice produced as Rhythm Production Document No. 2624. The documents filed in this proceeding reflect his subsequent and continuing awareness of the mark.

INTERROGATORY NO. 11:

Identify each incident of or statement, comment or inquiry concerning, confusion or a cross-reference in the trade or by a consumer between any use by another of a mark, designation or phrase comprising the word "rhythm" including, but not limited to, Applicant's RHYTHM IN BLUES trademark, and any trademark of Opposer comprising the word "rhythm" or product of Opposer marketed, advertised, labeled, or sold in connection with such a mark, including any return to Opposer of a product not originating with Opposer, identify each person having knowledge of or who participated in, and each document concerning, each such matter.

RESPONSE NO. 11:

Opposer objects to this interrogatory on the ground that is compound, vague, and incomprehensible. To the extent the interrogatory is understood, Opposer objects to this interrogatory on the ground that it is overly-broad and burdensome and not reasonably calculated to lead to the discovery of admissible evidence. Further responding, and without waiver of that objection, Opposer states that it is not aware of any incident of actual confusion vis-à-vis the opposed mark.

INTERROGATORY NO. 12:

Identify each person having knowledge of the events and circumstances under which Opposer has objected or considered objecting to the use or registration by another of a mark comprising the word "rhythm" and identify each document concerning each objection. The documents to be identified in response to this interrogatory include but are not limited to correspondence between Opposer or its counsel and the person or entity to

whom the objection was directed or its counsel, internal e-mails, documents or notes of Opposer, pleadings, papers, discovery requests and responses in any legal proceeding and any correspondence therein, and any public or private comment.

RESPONSE NO. 12:

Opposer objects to this interrogatory on the ground that it is overly-broad and burdensome and not reasonably calculated to lead to the discovery of admissible evidence. Further responding, and without waiver of that objection, see Opposer's production documents nos. 2446-2891.

INTERROGATORY NO. 13:

Identify each investigation, search, study, or analysis conducted by or on behalf of Opposer concerning its use or registration of a trademark comprising the word "rhythm" and identify each document concerning such matters.

RESPONSE NO. 13

Opposer objects to this interrogatory on the ground that it seeks information that is neither relevant to the issues of this proceeding, nor likely to lead to the discovery of admissible evidence. Further responding, and without waiver of any objection, Opposer states the following: None.

INTERROGATORY NO. 14:

Identify each investigation, search, study, or analysis conducted by or on behalf of Opposer concerning likelihood of confusion between a trademark used by Opposer

comprising the word “rhythm” and the mark of another comprising the word ‘rhythm’ and identify each document concerning such matters.

RESPONSE NO. 14:

Opposer objects to this interrogatory on the ground that it is overly-broad and burdensome and not reasonably calculated to lead to the discovery of admissible evidence. Further responding, and without waiver of that objection, see Opposer’s production documents nos. 2446-2891.

INTERROGATORY NO. 15:

Identify each investigation, search, study, or analysis conducted by or on behalf of Opposer concerning use or registration by another of a trademark comprising the word “rhythm” and identify each document concerning such matters.

RESPONSE NO. 15:

Opposer objects to this interrogatory on the ground that it is overly-broad and burdensome and not reasonably calculated to lead to the discovery of admissible evidence. Further responding, and without waiver of that objection, see Opposer’s production documents nos. 2446-2891.

INTERROGATORY NO. 16:

Identify each person who participated in, reviewed, directed, or was familiar with Opposer’s applications to register a trademark comprising the word “rhythm” and identify each document concerning such applications.

RESPONSE NO. 16:

Opposer objects to this interrogatory on the ground that it is overly-broad and burdensome and not reasonably calculated to lead to the discovery of admissible evidence. Further responding, and without waiver of that objection, see the applications underlying the pleaded registrations for the identities of the attorneys who filed the applications. As to who reviewed the first, second, and fourth applications, Opposer has no knowledge at this time. As to the third, William Maguire and Maurice Wong of Rhythm Holding Limited. Additional individuals, including those affiliated with Opposer's predecessors in interest, who may have been familiar with Opposer's applications to register a trademark comprising the word "rhythm" include Robert Murray, Peter Grey, Jamahl Grey, Daniel Wordsworth, and Eileen Hoffman. Opposer has no documents at this time, other than the documents already produced.

INTERROGATORY NO. 17:

Identify each person or entity to which Opposer has granted any right or permission to use a trademark of Opposer comprising the word "rhythm" and identify each document concerning such rights and permissions.

RESPONSE NO. 17:

Opposer objects to this interrogatory on the ground that it seeks information that is neither relevant to the issues of this proceeding, nor likely to lead to the discovery of admissible evidence. Further responding, and without waiver of any objection, Opposer states the following: None.

INTERROGATORY NO. 18:

Identify the media through which Opposer has advertised and promoted goods in connection with a trademark comprising the word “rhythm” and identify each document concerning the content and extent of such advertising and promotion.

RESPONSE NO. 18:

Opposer objects to this interrogatory on the ground that it is overly-broad and burdensome and not reasonably calculated to lead to the discovery of admissible evidence. Further responding, and without waiver of that objection, Opposer states that it employs print media (See Opposer’s production nos. 1-532, 557-1257, and 3057-4131), live events (1282-1289) , trade shows (1258-1281), in store displays and promotions (3046-3056). In addition, see the following social media sites:

Web: <http://usa.rhythmdivin.com/>

Facebook: <https://www.facebook.com/rhythmdivinusa/>

Instagram: <https://www.instagram.com/rhythm/>

Vimeo: <https://vimeo.com/rhythmus>

Twitter: https://twitter.com/rhythm_divin

Tumblr: <http://thesoundofchange.tumblr.com/>

Pinterest: <https://www.pinterest.com/surfdome/rhythm-the-sound-of-change/>

INTERROGATORY NO. 19:

Identify each use or registration by another of a mark or trade designation comprising the word “rhythm” in connection with wearing apparel known to Opposer and identify each document concerning such use or registration.

RESPONSE NO. 19:

Opposer objects to this interrogatory on the ground that it is overly-broad and burdensome and not reasonably calculated to lead to the discovery of admissible evidence. Further responding, and without waiver of that objection, see Opposer's production documents nos. 2446-2891.

INTERROGATORY NO. 20:

Identify each trade show in which Opposer showed goods bearing a mark comprising the word "rhythm" and each document concerning the presentation of such goods.

RESPONSE NO. 20:

Rhythm has exhibited at Agenda Long Beach for the past 4 years each January and July – 8 shows total; Rhythm has exhibited at Surf Expo Florida for the past 4 years each January and September (except January 2015) – 7 shows total. Rhythm has also exhibited at 2-3 regional shows each year such as the Gather in San Diego. Opposer objects to this interrogatory to the extent it calls for the identification of "each document" on the ground that this demand is overly broad and burdensome.

INTERROGATORY NO. 21:

Identify each person who participated in the preparation of, or supplied information for, Opposer's answers to these interrogatories and indicate the specific responses or portions thereof to which each person contributed.

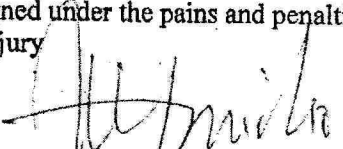
RESPONSE NO. 21:

Opposer objects to this interrogatory on the ground that it is overly-broad and burdensome and not reasonably calculated to lead to the discovery of admissible evidence. Further responding, and without waiver of that objection, Opposer states: Opposer's counsel and Mr. Barrett.

RHYTHM HOLDING LIMITED

Signed under the pains and penalties of
perjury

By:
Title:


MAURICE WONG
9 Dec 2015

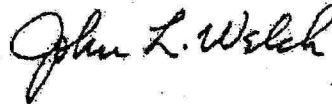
As to objections:



John L. Welch
Wolf, Greenfield & Sacks, P.C.
600 Atlantic Avenue
Boston, MA 02210
617-646-8000

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon Applicant this 11th day of December, 2015, by mailing a copy thereof via first-class mail, postage pre-paid, to James A. Power, Jr., Esq., Power Del Valle LLP, 233 West 72nd Street, New York, NY 10023.



John L. Welch

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MARGUERITE DEL VALLE
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January 7, 2016

0256.612

John L. Welch, Esq.
Wolf Greenfield & Sacks. P.C.
600 Atlantic Ave.
Boston, MA 02210-2211

Re: RHYTHM IN BLUES - Opposition 91-217589

Dear Mr. Welch:

Following the decisions on applicant's discovery motions and our communications since the filing of the original motion that was denied without prejudice, including opposer's twice revised interrogatory responses, I write to identify the matters concerning opposer's compliance that we deem to remain outstanding.

Opposer's responses to interrogatories 1, 2 and 4 assume that applicant is seeking information limited in scope to the original application, adoption, approval, etc. of opposer's RHYTHM marks by its predecessors, Planet Earth and Earth Products. On the contrary, as has been explained in prior correspondence, applicant also seeks in these interrogatories information and documents concerning opposer's acquisition of these trademark rights and attendant due diligence, including predecessor information that would be expected to now be in the possession, custody or control of opposer. The discovery sought, including searches, opinions, communications concerning due diligence prior to and concerning opposer's adoption of the marks via purchase and/or assignment, and persons having such knowledge, is relevant to assessing the strength of opposer's mark in the industry and the absence of a likelihood of confusion with applicant's mark.

While further explanation of the meaning of interrogatory 7 was provided to you with an invitation to identify what further clarification might still be required by opposer, we have no record of a response from you. If your objection depends upon what you deem an ambiguity in the meaning of a word or phrase in the interrogatory, please advise. Only then might we be able to address and resolve any remaining, genuine issue here. It has been explained that the interrogatory seeks documents concerning opposer's target market and how it defines that market in terms of demographics, consumer behavior, etc. Should you ignore "by" in the first line of that interrogatory, would that resolve a syntax irregularity that may be at the root of opposer's objection? You may limit its scope to the planning, strategic marketing, promotion and other documents that directly discuss or define those target market criteria.

We have completed a review of the documents thus far produced by opposer and nowhere find those concerning your client's oppositions to third party applications to register, or petitions to cancel registrations of, marks comprising RHYTHM. Moreover, opposer has produced, in response to applicant's requests for documents concerning opposer's objections to third party uses, registrations, and applications to register such marks, only a few formal protests and Trademark Office responses thereto, and a handful of cease and desist letters.

John L. Welch, Esq.
January 7, 2016
Page 2

Applicant's interrogatories no. 12, 14, 15 and 19, and document requests no. 1 (insofar as it calls for the production of documents identified in those interrogatories), 3, 11 and 14, encompass not only letters of protest and warning letters but all correspondence between your client or its counsel and third parties and their counsel regarding oppositions, petitions, protests and objections, including settlement negotiations, agreements, memoranda of co-existence, and other understandings with opposer regarding use and registration of marks comprising RHYTHM. We know that your client has opposed and petitioned to cancel several such marks and, as recognized by the Board in reconsidering applicant's motion to compel, opposer should thus be prepared to respond to these requests. The documents produced in these categories should be organized by proceeding and/or recipient of opposer's objection, as kept by opposer or its counsel in the ordinary course of business, and should be comprehensive at least with respect to each proceeding or record and objection thus far disclosed by opposer.

In view of the limited time scheduled by the Board in which to accomplish these goals, viz., by January 8, 2016, including by renewed motion to compel as the Board expressly suggested, we should try to move quickly in resolving these matters. It does seem likely, however, that a motion will have to be filed, but that we should be able to continue our efforts to reach a resolution of any remaining issues, after which the motion may be withdrawn. These matters have been addressed many times over the course of the better part of a year.

Please let me have your thoughts at your earliest convenience.

Very truly yours,

A handwritten signature in black ink, appearing to read "James A. Power Jr.", with a stylized flourish at the end.

James A. Power Jr

c: William E. Maguire, Esq.